LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. [redacted]-54

MICHAEL J. SCANDIFIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, N. Y. 10007
RE 2-1322

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
The Facts Considered	4
POINT I—The statute, 18 U.S.C. § 2314 permits conviction only if someone transports certain articles such as counterfeit securities in interstate commerce or knowingly and wilfully causes such property thus to be transported. Scandifia, as recognized even by the trial court, did not himself transport any of the bonds, and was not aware that anyone else so transported them. Yet, conviction was ruled permissible because Scandifia had delivered the securities without "limitation" as to where they were to be transported	5
A—The lack of knowledge on petitioner's part that the securities would be transported across state lines by others without his approval or consent was nevertheless deemed consistent with a violation of this statute as the trial court held that the statute could be violated without knowledge or intent. This renders the statute unconstitutionally vague and exposes the most innocent person to conviction	5

PAGE

POINT II—The petitioner was denied a fair trial by the premeditated and calculated adduction of evidence by the prosecutor that Scandifia had been indicted for a similar crime and that he may have had a "criminal" background. The latter was particularly flagrant since in the abortive "first" trial, a similar tactic was used and an objection sustained 10

POINT III—The evidence could not have established a crime unless the Government's witness, Hersch, and perhaps Cohen were found to be accomplices. No indictment for conspiracy or acting in concert existed. Moreover, the Court should have issued cautionary instructions with respect to corroboration and the "weight" to be accorded to Cohen and Hersch. There is no "agency" in criminal law—all are "principals" 12

POINT IV—The appellant was prejudiced as a matter of law by an inordinate delay of almost five years time between the offense and the prosecution. This delay appears to be calculated, rather than unavoidable, since the offense must have been known for some time 13

POINT V—The petitioner had never previously been convicted of any crime. Yet at trial, the prosecutor seriously prejudiced his rights to a fair trial by eliciting evidence of another unproved crime which was not charged in the indictment 15

Conclusion 17

INDEX TO APPENDIX

Opinion A-1

Order Denying Petition for Rehearing In Banc A-15

Order Denying Stay of Mandate A-16

Authorities Cited

Cases

	PAGE
Cummings v. Missouri, 4 Wall. 277 (1866)	16, 17
Drehman v. Stine, 8 Wall. 595	16
Godfrey v. United States, 358 F. 2d 850 (D.C. Cir. 1966)	14
Gomila v. United States (5th Cir.), 146 F. 2d 372	15
Klopfer v. North Carolina, U.S. (1967)	14
Mapp v. Ohio, 367 U.S. 643	14
McMillen, Jr. v. United States, F.2d (1st Cir. 11/28/67), 3 Crim. L. Bull. No. 10, p. 698	12
Nash v. United States, 54 F. 2d 1006 (2 Cir. 1932)	11
Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963)	16
People v. Defore, 242 N.Y. 13	14
People v. Prosser, 309 N.Y. 353	14
Pereira v. United States, 347 U.S. 1	7, 8
Regina v. Robbins, 1 Cox C.C. 114 (1844)	14
Ross v. United States, 349 F. 2d 210 (D.C. Cir. 1965)	14
Todd v. United States, 158 U.S. 278	9
United States v. Atkinson, 297 U.S. 157	15
United States v. Bozza (2 Cir. 1966), 365 F. 2d 206	11
United States v. Feinberg (2 Cir. 1967), Docket #30739	13
United States v. Granello (CA 2d 1966) 365 F. 2d 990	13
United States v. Hammond, 360 F. 2d 688 (2 Cir. 1965)	14
United States v. Kenofskey, 243 U.S. 440	9
United States v. Lovett, 328 U.S. 303	16, 17
United States v. Lustman, 258 F. 2d 475 (2 Cir. 1958)	14

PAGE

United States v. Modern Reed & Rattan Co. (2 Cir. 1947), 159 F. 2d 656, cert. denied 331 U.S. 831 15
United States v. Provoo, 350 U.S. 857 (1955) 14
United States v. Tamaiolo (2 Cir. 1957), 249 F. 2d 683 ..... 11, 16
United States v. Weisman, 83 F.2d 470, cert. denied 299 U.S. 560 9

Wilborg v. United States, 163 U.S. 632 15
Wolf v. Colorado, 338 U.S. 25 14

Statutes

18 U.S.C. § 2 ..... 1, 2, 12
18 U.S.C. § 371 12
18 U.S.C. §§ 2314 ..... 1, 2, 3, 5
28 U.S.C. § 1254(1) 2

Federal Rules of Criminal Procedure:
46(a) (2) 16
52(b) 9, 12

New York Code Criminal Procedure:
Section 399 13

United States Constitution

Fifth Amendment 3, 14
Sixth Amendment 3, 13, 14

Miscellaneous

Caleb Foote—The Coming Constitutional Crisis in Bail, 113 U. Pa. L.Rev. 960 (1965) 16
Hart & Honoré, Causation in the Law 64 9
16A C.J.S. Const. Law. §§ 452, 455 16

IN THE

Supreme Court of the United States

October Term 1967

No.

MICHAEL J. SCANDIFIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER, Michael J. Scandifia, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming Petitioner's conviction for violating Title 18 U.S.C. §§ 2314 and 2 ("wilfully causing" the interstate transportation of counterfeit securities), nine counts.

Opinion Below

The opinion below in the Court of Appeals, Second Circuit, not yet reported, is reprinted in the Appendix hereto (App. A1-14).*

---

* Unless otherwise indicated, the Appendix to this brief is prefixed by "App."; to the Government's Appendix below by "G-".

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1). The Court of Appeals, Second Circuit, denied a motion for rehearing on March 5, 1968, thereby adhering to its affirmance of the judgment of conviction (rendered January 31, 1968).

Questions Presented

1. Whether 18 U.S.C. 2314 is being constitutionally applied against Petitioner in view of the fact that he never transported any of the securities nor was there any evidence that he "knowingly" or "wilfully" *caused* others to do so.

2. Is 18 U.S.C. 2314 so vague and nebulous as applied in a situation like the case at bar that it denies an accused due process of law since it permits prosecution without knowledge of or participation in the transportation by the accused.

3. Whether Petitioner received a fair trial in view of the adduction of inadmissible prejudicial testimony by the prosecutor, apparently with pre-conceived design, and the articulation by the Court of a legally incorrect charge to the jury.

4. Whether testimony by "accomplices" should be deemed sufficient to warrant conviction for crime without cautionary instructions as to reliability and "interest", and without requiring "corroboration".

5. Whether the defendant was denied a "speedy" trial as a matter of law where the prosecution commenced almost on the eve of the expiration of the statute of limitations,

particularly where such delay may have been deliberate and calculated to deny a fair trial.

Constitutional and Statutory Provisions Involved

Pertinent portions of the Fifth and Sixth Amendments and Title 18 U.S.C. §§ 2314 and 2 are reprinted in Appendices, (App.)

Statement of the Case

The petitioner, Michael J. Scandifia, was indicted on 11 counts, each charging that on a specific day, between November 11, 1960 and November 30, 1960 he had *"wilfully, and knowingly and with unlawful and fraudulent intent"* caused "to be transported in interstate commerce" certain falsely made, forged and counterfeited securities (see indictment).

The indictment was returned in 1965, almost the full period of the Statute of Limitations.

The securities involved were Shell Union Oil Co. bonds and the points of transport were New York City and Monmouth County, New Jersey.

Following a mistrial because of a dead-locked jury, a second trial held before Tenney, D.J. resulted in a conviction on nine counts (the only counts submitted) for which Petitioner-Defendant was sentenced to concurrent terms of six (6) years on each count.

The Facts Considered

The indictment against Scandifia did not charge a conspiracy as a substantive crime, nor did it allege that he acted in concert with others. It charged that acting alone, and unaided, he "wilfully and knowingly" *caused* the interstate transportation of certain Shell Union Oil Company bonds which he "knew" to be counterfeit.

The government introduced evidence that in some manner Petitioner had acquired certain Shell bonds which he then supposedly used in connection with a scheme whereby certain "innocent" investors could obtain short term loans using the bonds as collateral. Scandifia's share in this plan was to be a payment of 60 per cent of the face value of the bonds.

The Petitioner took the stand in his own defense and of course denied all of the accusations. He testified that he was 48 years old, married, and had never been convicted of any crime.

The proof adduced at trial revealed that Scandifia was never charged with having transported any of the bonds. There was no proof at all that he "knew" that the bonds were to be transported. He never gave any instructions that they be transported, nor was there any evidence that of necessity, it was inevitable that they would so be transported.

As a matter of fact, there was no evidence that the Petitioner ever knew that the bonds were counterfeit until a government witness, Hersch, allegedly told him so following information Hersch had received from another witness, Rabstein.

As a matter of fact, loans were obtained from the banks by pledging these bonds until somewhat later, it was allegedly reported that some were counterfeit.

When the Witness Cohen was called by the Government, he was asked certain self-serving questions probing the operation of his own mind. The answers, as will be discussed infra, indicated that Scandifia had a "criminal" background, without proof or foundation, despite the fact that he had never previously been convicted of a crime. This was egregious error.

POINT I

The statute, 18 U.S.C. § 2314 permits conviction only if someone transports certain articles such as counterfeit securities in interstate commerce or knowingly and wilfully causes such property thus to be transported. Scandifia, as recognized even by the trial court, did not himself transport any of the bonds, and was not aware that anyone else so transported them. Yet, conviction was ruled permissible because Scandifia had delivered the securities without "limitation" as to where they were to be transported.

—A—

The lack of knowledge on petitioner's part that the securities would be transported across state lines by others without his approval or consent was nevertheless deemed consistent with a violation of this statute as the trial court held that the statute could be violated without knowledge or intent. This renders the statute unconstitutionally vague and exposes the most innocent person to conviction.

The entire case herein turns on the question of whether Scandifia "knowingly" and "wilfully" *caused* the interstate transport of certain counterfeit bonds.

There was absolutely no proof or charge that Scandifia himself transported any of these bonds in violation of the Statute. There was a total dearth of proof that Petitioner knew or could have known that these bonds would be transported across State lines.

The indictment did not charge that Scandifia either engaged in a conspiracy or acted in concert with anyone else. Thus, the act of an accomplice legally could not be imputed to him since the government proceeded on the premise that no accomplice or co-conspirators existed.

The act of Hersch in admittedly taking the bonds from New York to New Jersey, albeit without Scandifiia's knowledge or instructions, was deemed a criminal act of Petitioner's. Scandifia clearly did not encourage, sanction, know of, or ratify the actions of anyone else in transporting the bonds.

The trial court however, misinterpreting the Statute, charged the jury as follows (Record p. 796):

> "Now, the statutes which the indictment charges were violated by this defendant do *not require proof* by the government of *knowledge* on his part that the bonds were to be transported in interstate commerce. The government is only required to prove in this connection that the bonds were actually transported in interstate commerce and that the defendant caused them to be so transported.
>
> "If the defendant turned over bonds to Hersch or to some other person *without limitation* as to where they were to be transporated, and if in fact thereafter the bonds were transported in interstate commerce, then the jury might properly find that the defendant *caused* their transportation in interstate commerce." (R. 796)

Thus it is clear that the trial judge and the Court below, assume that the Statute permits conviction without knowing or wilful participation in the crime. It must be borne in mind that the possession of a counterfeit security is not *ipso facto* a violation of this statute. It is the knowing and wilful transportation across state lines, or knowing and wilful "causation" thereof, that *alone* results in violating this law.

If Hersch were charged with being an accomplice or co-conspirator, then perhaps the acts of Hersch could be charged against Scandifia. But the theory of the Government was that Hersch was no such thing—that he had no conspiratorial connection with Scandifia at all. In that light, it is inconceivable that his act in taking the bonds to New Jersey from New York could in any way bind Petitioner unless Petitioner "knew" or ordered or ratified the transportation. There is no such evidence. The trial court charged the jury that it need not concern itself with such evidence.

In essence, the trial court held that if the bonds were in fact transported by anyone, irrespective of Scandifia's knowledge or awareness or participation, the indictment could be sustained.

In the instant case, we do not have a situation like that presented in *Pereira* v. *United States,* 347 U.S. 1, 9 where the Court could find that it was "common knowledge" that the property would have to cross state lines. There the Court was considering checks deposited, but drawn on an out of state bank. Obviously, in order to collect or clear them, they would have to cross state boundaries.

But *Pereira* also holds that "knowledge" is a prerequisite. In the present case, there was admittedly no "knowledge". As seen from the Court's charge, the jury was not required to determine if Scandifia knew about the possibility that the bonds would be transported across state lines. This therefore, presumes that the person who *ever* touches a counterfeit or stolen item must thereafter become an "insurer" that it will never thereafter move across a state or national border. It is not conceivable that such is the law. The Statute does not so provide—and the indictment required that the jury find "wilful and knowing" violations, not retrospective happenstances that at some time the bonds crossed state boundaries.

Unlike in *Pereira* v. *United States, supra,* the Petitioner herein could not have had "common knowledge" that the bonds would be transported to New Jersey.

Even the Second Circuit could not swallow the argument that the omission of Scandifia to "limit" the area where the bonds could be taken was sufficient to render him liable to conviction.

In the Solicitor General's opposition to Bail, he cites *Pereira* and indicates that the jury could have found certain facts. But such reasoning is not in accordance with the case itself or the trial court's interpretation of the Statute. The trial Court charged that if the jury found that Scandifia had in fact delivered the bonds without "limitation" of where it was to be taken, *that was enough!* That is *not* what this Court in *Pereira* or the statute or the indictment say.

At 1278 of the slip opinion of the Court below, the Second Circuit condemned the vagueness of the charge on the question of "without limitation". (App. 11)

See: Hart & Honoré, Causation in the Law 64.

In addition, the case at bar did not involve a letter which one might reasonably foresee could be mailed (*United States* v. *Weisman,* 83 F.2d 470, cert. denied 299 U.S. 560; nor can it be said that Scandifia "brought about" the result (*United States* v. *Kenofskey,* 243 U.S. 440, 443).

The Circuit Court dealt in speculation as to what the jury might have gleaned or found from the record. Were it not for the patently incorrect charge on the law to be applied, perhaps the Circuit Court would have been justified. But in light of the fact that the jury need only have found that Scandifia gave the bonds "without limitation" as to where they were to be taken to convict, it is clear that the Court below was speculating on the basis of the record without paying heed to the actual charge as rendered.

To say he "caused" this transportation is the most Pickwickian and fatuous interpretation of law that can be imagined. The charge was plain error (52-(b) F. R. Crim. P.).

In *Todd* v. *United States,* 158 U.S. 278, 282, our highest Court observed:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute'. *U.S.* v. *Lacher,* 134 U.S. 624. . . . End. Interp. St. (2d Ed.) Sec. 329; Pm. Sedg. St. Const. Law, 280."

POINT II

The petitioner was denied a fair trial by the premeditated and calculated adduction of evidence by the prosecutor that Scandifia had been indicted for a similar crime and that he may have had a "criminal" background. The latter was particularly flagrant since in the abortive "first" trial, a similar tactic was used and an objection sustained.

The United States Attorney trying the case was undoubtedly aware that the petitioner had never been convicted of a crime and that he would take the stand. In the first trial, which ended in a hung jury, the prosecution witness, Cohen, sought to testify as to the "criminal" background of Scandifia—who had never been convicted before.

The questioning of Cohen on redirect elicited the following: (G-61a; Record 237, 238):

> "By Mr. Fawer:
>
> "Q. Why did you tell the F.B.I. what you did in 1960 and 1961?
>
> "Mr. Brodsky: Objected to, if your Honor please.
>
> "The Witness (Cohen): It is pertinent your Honor.
>
> "The Court: Overruled: I will allow it.
>
> "A. My family had received threatening phone calls.
>
> "Q. I ask now why did you? A. For fear of my family's life, *knowing Mr. Scandifia's background.*
>
> "Mr. Brodsky: I move to strike it out. At this time I respectfully ask for a withdrawal of a juror and the declaration of a mistrial.
>
> "The Court: Denied.
>
> "Mr. Brodsky: I respectfully except.
>
> "The Court: The jury will disregard the last part of the statement." (G. App. 61a; R. 237, 238)

But this was not "unexpected responses" innocently elicited. The record of the first trial, the mistrial, at pages 255 and 256 of minutes of February 9, 1967, show a similar pattern of questioning with similar if not identical responses. Thus the questioning was a premeditated and calculated design to prejudice the petitioner and to poison the minds of the jury.

Thus, it is submitted that where a *premeditated and deliberate intent is manifested to elicit prejudicial testimony,* that ipso facto is sufficient to warrant a reversal.

Thus in *United States* v. *Tamaiolo* (2 Cir. 1957), 249 F. 2d 683, this court noted that prejudicial testimony elicited with probable knowledge of what would be said, precluded a fair trial (id. at 695):

> "It made a fair and impartial trial impossible. Although the jury was advised to *disregard the statement that could not have erased* from their minds the prejudicial effect . . .
>
> ". . . it is fairly apparent that the prosecutor *knew* the answers . . . certainly the . . . F.B.I. [and Cohen] had already advised him, out of court . . ." (italics ours)

In *Nash* v. *United States,* 54 F. 2d 1006, 1007 (2 Cir. 1932) and *United States* v. *Bozza* (2 Cir. 1966), 365 F. 2d 206, 215, that court noted that such an instruction (to disregard statement) was meaningless since no jury is capable of such a *mental gymnastic.* The remark gave the impression that Scandifia had a criminal background, although he had never been convicted of any crime.

With knowledge, at least from the first trial where the Judge (Wyatt) had sustained an objection, the prosecutor had no right to pursue this line of questioning from which he had every reason to know that prejudicial and inflammatory conjecture would flow.

POINT III

The evidence could not have established a crime unless the Government's witness, Hersch, and perhaps Cohen were found to be accomplices. No indictment for conspiracy or acting in concert existed. Moreover, the Court should have issued cautionary instructions with respect to corroboration and the "weight" to be accorded to Cohen and Hersch. There is no "agency" in criminal law—all are "principals."

The evidence from Hersch and Cohen indicates that they were engaged in an "easy money" plan which they said emanated from Scandifia. The prosecutor took the position that Hersch and Cohen were "agents". This is nonsense, since *there is no doctrine of "agency" in the criminal law.* All who participate or aid and abet are "principals", not agents. There was no "conspiracy" count and therefore the acts of Hersch and Cohen could not be made binding on Scandifia. (See, 18 U.S.C. § 2; 371). When testimony of Cohen and Hersch was used as the mainstay of the prosecution's case, the government was using the theory of "accomplice", although no indictment so charged and the jury was not permitted to so infer.

In view of this, the Court should have charged, *sua sponte* that the testimony of Cohen and Hersch should be scrutinized with the same care as that of Scandifia himself.

See:

McMillen, Jr. v. *United States,* F.2d (1st Cir. 11/28/67), 3 Crim. L. Bull. No. 10, p. 698;

Rule 52(b) F.R. Crim. P.

Testimony of such persons who themselves could be prosecuted should be held insufficient as a matter of law to warrant a conviction without other evidence tending to connect the defendant to the crime. At least the trial courts should be required to so charge (Compare: Section 399 N.Y. Code Crim. Pro.)

POINT IV

The appellant was prejudiced as a matter of law by an inordinate delay of almost five years time between the offense and the prosecution. This delay appears to be calculated, rather than unavoidable, since the offense must have been known for some time.

The petitioner was prejudiced as matter of law by the inordinate and prejudicial delay between the time the crime is alleged to have occurred and the indictment. This denied him "speedy justice," and violated his rights under the Sixth Amendment, viz: *offense* committed in November 1960; *indictment* in Sept. 30, 1965.

This indicates that virtually the entire period of the statute of limitation had expired before indictment. Memories grow dim; records are lost; witnesses die or disappear and it lulls a suspect into a false sense of security that he will not be prosecuted and that there is no need to recollect events, keep records or stay in contact with witnesses. This case indicates it may be part of a pattern in bringing prosecution in this District as is seen from such cases as *United States* v. *Feinberg* (2 Cir. 1967), Docket # 30739; *United States* v. *Granello* (CA 2d 1966) 365 F. 2d 990 and so forth, where inordinate delay is indicated despite the fact, as herein, the government was apparently aware of the alleged crime for some time.

Here again, there was no exception or motion made, but it is submitted that fundamental fairness requires action by this Court where it may be a calculated design to prevent a fair trial or the making of a proper defense.

See:

United States v. *Provoo,* 350 U.S. 857 (1955);
People v. *Prosser,* 309 N.Y. 353;
Klopfer v. *North Carolina,* U.S. (1967).

See, too:

Godfrey v. *United States,* 358 F. 2d 850, 862 (D.C. Cir. 1966);
Ross v. *United States,* 349 F. 2d 210, 211 (D.C. Cir. 1965);
United States v. *Hammond,* 360 F. 2d 688 (2 Cir. 1965);
United States v. *Lustman,* 258 F. 2d 475 (2 Cir. 1958).

It is clear that delay of such long duration may not only violate the Sixth Amendment speedy trial provision, but may well also violate the Fifth Amendment due process provision. (*Ross* v. *United States* (D.C. Cir. 1965), *supra,* 249 F. 2d at 211. See, also, *Regina* v. *Robbins,* 1 Cox C.C. 114 (1844). The lack of speedy justice ought to be treated in the same manner as other constitutional violations. Deterrence of such practices can only be accomplished by voiding the conviction. (Compare: *Mapp* v. *Ohio,* 367 U.S. 643 with *People* v. *Defore,* 242 N.Y. 13 and *Wolf* v. *Colorado,* 338 U.S. 25, 28).

POINT V

The petitioner had never previously been convicted of any crime. Yet at trial, the prosecutor seriously prejudiced his rights to a fair trial by eliciting evidence of another unproved crime which was not charged in the indictment.

It was prejudicial and unfair for the prosecutor to adduce evidence of another crime not charged in the indictment herein, since it only served to prejudice the jury and the court.

Over vehement objection of defense counsel and upon admonition of the Judge that the government was courting error, the prosecutor asked Scandifia about 100 counterfeit IT&T bonds. (G. App. 109a-111a)

No possible purpose could be accomplished since no proof was offered and no conviction had been obtained.

In *United States* v. *Modern Reed & Rattan Co.* (2 Cir. 1947), 159 F. 2d 656, cert. denied 331 U.S. 831, this court said (at 658 of 159 F. 2d):

> "The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime, even though of the same nature is not admissible."

This in *Modern Reed & Rattan Co.* was held to be error even though *no objection* was voiced.

Accord:

Wilborg v. *United States,* 163 U.S. 632;
United States v. *Atkinson,* 297 U.S. 157;
Gomila v. *United States* (5th Cir.), 146 F. 2d 372.

This was not even a "crime", but merely referred to an indictment where the presumption of innocence still attaches, despite the contrary belief of the prosecutor. No instruction or the like was sufficient to eradicate this prejudice.

See:

United States v. *Tomaiolo, supra.*

This error was repeated at sentence too where the prosecutor adverted to many unproved accusations as if they were "crimes". This was grossly unfair. It was akin to an **"attainder."** Scandifia was denied bail on these improper, unproved accusations.

While this may not be a truly "legislative act" it is nevertheless akin to a bill of "pains and penalties" (bill of attainder) in violation of Article I Section 9 of the U.S. Constitution.

A bill of Pains and Penalties is ordinarily a legislative act without a judicial trial, which imposes a penalty less than death. Such bills are within the constitutional prohibition against Bills of Attainder. (*Drehman* v. *Stifle,* 8 Wall. 595, 601; 16A C.J.S. Const. Law. §§ 452, 455).

ss: *United States* v. *Lovett,* 328 U.S. 303, 322;
Cummings v. *Missouri,* 4 Wall. 277, 320 (1866);
Pannell v. *United States,* 320 F.2d 698 (D.C. Cir. 1963);
Rule 46(a) (2) F .R. Crim. P.;
Caleb Foote—The Coming Constitutional Crisis in Bail, 113 U. Pa. L.Rev. 960 (1965).

In *Cummings* v. *Missouri, supra,* the Court noted at 4 Wall. 320:

> "The deprivation of any rights, civil or political previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

CONCLUSION

The writ of certiorari should be granted because of the important questions raised herein.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 246—September Term, 1967.

(Argued January 5, 1968 Decided January 31, 1968.)

Docket No. 31705

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL J. SCANDIFIA,

Appellant.

Before:

MOORE, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York before Judge Charles H. Tenney and a jury, for wilfully causing the interstate transportation of counterfeit securities in violation of 18 U. S. C. §§2314 and 2.

Affirmed.

ELKAN ABRAMOWITZ, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney, Michael S. Fawer, Assistant United States Attorney, of counsel), *for appellee.*

Appendix

H. ELLIOT WALES, New York, N. Y. (Abraham H. Brodsky, of counsel), *for appellant.*

KAUFMAN, *Circuit Judge:*

The question presented on this appeal is whether the defendant Michael J. Scandifia "wilfully caused" the interstate transportation of counterfeit securities in violation of Title 18, United States Code, Sections 2314 and 2.[1]

The indictment, filed on September 30, 1965, was in 11 counts, each of which charged that on a specific day, between November 11, 1960 and November 30 of that year, Scandifia caused the interstate transportation of counterfeit Shell Union Oil Corporation bonds between New York City and Monmouth County, New Jersey. Following a mistrial because the jury was unable to reach a verdict, a second trial was held before Judge Tenney and a jury. Scandifia was found guilty of 9 counts—2 counts having been severed at the government's request before the first trial—and was sentenced to concurrent terms of 6 years'

---

[1] 18 U.S.C. §2314 provides:

* * * * *

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

imprisonment on each count. For the reasons set forth below, we affirm.

In order to keep in focus the major question on appeal, we will first describe Scandifia's scheme as the jury might have found it viewing the facts and the inferences to be drawn therefrom in the light most favorable to the government, *United States* v. *Edwards,* 366 F. 2d 853 (2d Cir. 1966), cert. denied, sub nom. *Jakob* v. *United States,* 386 U. S. 908 (1967); *United States* v. *Kahaner,* 317 F. 2d 459 (2d Cir.), cert. denied, 375 U. S. 836 (1963); and then detail the facts relating to the individual counts.

Despite the *sparse* briefs and appendices, we glean from the record that a number of people who had invested in the Hersch Trading Company (company) were pressing to be repaid. One Morton Rosenberg, who seemed to be one of those principally responsible for financial matters, explained to Leon Hersch and Irving Cohen, his partners in the company, that he had no funds at the present time because he had invested sums of money in a Brooklyn garage owned by Scandifia. Hersch was determined to verify Rosenberg's tale and, accordingly, telephoned Scandifia, who put the lie to Rosenberg and denied flatly that the latter had invested in the garage. In any event, we discover that some time later, Hersch—with the consent of the company's investors——entered into an agreement with Scandifia for the latter's aid in collecting what Rosenberg owed. For his services, Scandifia was to receive 10 per cent of the total amount due and was given a deposit of 1 per cent in advance. His inability to collect the debts did not exhaust his resourcefulness or deter him from turning this failure into a venture in his own behalf. Despite the news that

even he could not get blood from a stone, he presented an appealing plan whereby the investors could obtain ready cash while he continued to pressure Rosenberg. And so, at a meeting at Hersch's New Jersey home in the latter part of October 1960—attended by Cohen and Jerome Lasky, Leonard Ledwitz and Sam Serkin, 3 of several investors—Scandifia exhibited to the group what purported to be legitimate Shell Union Oil bonds. He refused to explain how he had secured them, but he did state that the purpose of the display was to assure all concerned that ultimately they would recover the monies Rosenberg owed. Indeed, he added that if the investors wanted to make more money, this was an opportunity, and explained how they could reap profits by negotiating loans with bonds as collateral.

With the hook thus baited, in early November 1960, Hersch and Scandifia met in a New York City restaurant where Scandifia explained the full details of his plan. He envisaged the investors obtaining short term loans on Scandifia's Shell Union Oil bonds. They could retain any amount they were able to borrow in excess of 60 per cent of the face value of the bonds, but 60 percent of face value was to be returned to Scandifia as his share. Scandifia went on to explain that when he succeeded in collecting the monies owed by Rosenberg, the short term loans would be paid off. In the interim, all concerned would have had the use of large sums of money even though Rosenberg's debt was uncollected.

Scandifia failed, however, to tell Hersch that the bonds were counterfeit. But Hersch was skeptical about their validity, and arranged to have them examined at a bank

in the vicinity. The bank, failing to detect the counterfeit, informed Hersch that they were acceptable as collateral for a loan. Hersch's concern thus alleviated, he agreed to cooperate in the execution of Scandifia's plan.

Accordingly, counterfeit bonds, having a face value of $410,000, were pledged at various unsuspecting banks in New York and New Jersey during November 1960. Scandifia received over $168,000 as his share of the loans before it was discovered that the bonds were counterfeit.

The circumstances under which the bonds were transported between New York and New Jersey vary. Accordingly, they will be described separately.[2]

The Aaron Starr Transaction—Count Three. The first loan was successfully negotiated at a Brooklyn bank on November 9, 1960 to the delight of all concerned. On November 12, Scandifia gave Hersch 30 bonds for Aaron Starr, one of the investors who lived in Freehold, New Jersey. Hersch, who also lived in New Jersey, drove out to Starr's home to show him the bonds and to explain the plan. Starr found the plan acceptable and on November 14 the two men drove to New York City where Starr obtained a loan from a local bank by pledging the 30 bonds. The bonds were in the trunk of the car during the trip from New Jersey to New York. Count three charged Scandifia with having caused the transportation of these bonds to New York.

Leonard Ledwitz Transactions—Counts Two, Four, Nine and Eleven. Hersch gave Scandifia his share of the Starr loan, and received in return 20 bonds for Ledwitz, who

---

[2] Those transactions that were not the basis of Scandifia's conviction will be discussed.

lived in New Jersey. Scandifia had met Ledwitz at a previous conference in Hersch's home. On November 14, Hersch took these bonds from New York City to Ledwitz' home (count two) and 2 days later Hersch and Ledwitz returned to New York with the bonds at which time Ledwitz negotiated a loan (count four).[3] Several days later, Ledwitz asked Hersch for more bonds. Hersch relayed the request to Scandifia, who gave him 30 additional bonds. Once again Hersch took them to New Jersey (count nine), but Ledwitz never made use of them.

The various parties had arranged to meet at Hersch's New Jersey home on November 30. Prior to the meeting, however, Ledwitz told Hersch that his bank claimed that the bonds were counterfeit. Acting under instructions from Scandifia, Hersch advised Ledwitz to bring his remaining bonds to the meeting. At this gathering Ledwitz insisted that he wanted his money back; Scandifia assured him he would have it within a day or two. Ledwitz then returned the bonds to Scandifia who left with them, stating that he was going to New York to make arrangements for the return of the money (count eleven).

The Solomon Rabstein Transactions—Counts Five, Six, Seven and Ten. Sometime earlier, Hersch had spoken to another investor who had been at the first meeting at Hersch's home, one Sam Serkin, who agreed to obtain a loan on 50 bonds. Following the familiar pattern, Scandifia gave Hersch the bonds and Hersch took them to Serkin at his New Jersey office. On November 21, Serkin attempted

---

[3] The indictment appears to have taken November 13 as the date of the second count. Scandifia does not claim to have been prejudiced by the variance.

to pledge the bonds, but was unable to negotiate a loan on satisfactory terms. He then suggested that the bonds be turned over to Solomon Rabstein, a creditor of his who might be able to arrange better terms.[4] Hersch agreed, but Rabstein insisted on having the bonds examined in New York at the Irving Trust Company, the trust agent for Shell Union Oil bonds. On November 23, he and Hersch took the bonds to New York (count five); the bank failed to detect that the bonds were counterfeit. Hersch and Rabstein then returned to New Jersey where Rabstein negotiated a loan (count six). Later that evening, Hersch telephoned Scandifia in Brooklyn and told him that since nighttime was approaching he did not want to drive to Brooklyn (in order to deliver his share of the Rabstein loan). Scandifiia agreed to come to New Jersey and a meeting was arranged at a restaurant close to South Amboy. On that occasion Scandifia received his share of the Rabstein loan and turned over 100 more bonds to Hersch.[5] On November 25, Hersch gave these bonds to Rabstein who, still dubious over dealings which seemed too good to be true, insisted that they go to New York to have the bonds examined again. The bonds were taken to New York (count seven), and this time the trip bore fruit for the counterfeit was discovered by the American Bank Note Company, the printer of the genuine Shell bonds.

---

[4] Scandifia claims that Rabstein was a total stranger to him. But both Rabstein and Scandifia testified to being present at a meeting at Scandifia's garage which, as we read the record, took place prior to the Rabstein loan.

[5] For reasons unknown to us, Scandifia was not indicted for having himself transported these bonds in interstate commerce from New York to South Amboy.

Hersch promptly informed Scandifia of Rabstein's discovery and a meeting was arranged in Brooklyn. For obvious reasons, the discussion was heated. Rabstein threatened to go to the police if his money was not returned, and refused to release to Scandifia the bonds still in his possession. Scandifia, however, took them by force, but agreed to return his share of the Rabstein loan. Several hours later, Scandifia gave this money to Hersch, but told him not to give it to Rabstein until the bonds Rabstein had pledged were redeemed. On November 28, the bonds were redeemed and Hersch turned the money over to Rabstein. Hersch then telephoned Scandifia and was told "to come into New York and give him [Scandifia] the bonds"; he performed as instructed (count ten).

Other than the money thus returned to Rabstein, no part of Scandifia's share of the other loans negotiated through the use of the Shell bonds was ever recovered from him.

With these tortuous facts in mind, we turn to the points raised on this appeal. Scandifia testified in his own defense and denied any participation in or knowledge of a scheme to obtain loans on Shell Union Oil bonds. Indeed, while he admitted acquaintance with the *dramatis personae,* he claimed never to have seen a bond or security certificate before the commencement of the instant proceedings. Thus, the basic factual issue before the jury was clear—did they believe Scandifia or the numerous government witnesses?

The experienced and able trial judge instructed the jury that

> The statutes which the indictment charges were violated by this defendant do not require proof by the gov-

> ernment of knowledge on his part that the bonds were to be transported in interstate commerce. . . .
>
> If the defendant turned over bonds to Hersch or to some other person without limitation as to where they were to be transported, and if in fact thereafter the bonds were transported in interstate commerce, then the jury might properly find that the defendant caused their transportation in interstate commerce.

While counsel strenuously objects on appeal to this instruction, no objection was noted at the trial and no other instruction was requested. Under these circumstances, Scandifia may not now challenge these instructions. See Fed. Rules Crim. Proc. 30; *Lopez* v. *United States,* 373 U. S. 427, 436 (1963). Cf. *United States* v. *Indiviglio,* 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966). Nor does the doctrine of "plain error" save the day for Scandifia. Any alleged error in the charge did not seriously prejudice the defendant or affect the fairness or integrity of the trial so that a mistrial or miscarriage of justice would result unless we recognized that the trial judge had committed "plain error." See Fed. Rules Civ. Proc. 52(b); *United States* v. *Minieri,* 303 F. 2d 550 (2d Cir. 1962) cert. denied, 371 U. S. 847 (1962); *United States* v. *Frascone,* 299 F. 2d 824 (2d Cir. 1962) cert. denied, 370 U. S. 910 (1962); *United States* v. *Sansone,* 231 F. 2d 887 (2d Cir.) cert. denied, 351 U. S. 987 (1956). We have already noted that Scandifia claimed that he never (1) gave Hersch or anyone else any bonds, (2) caused their interstate transportation, or (3) participated in any loan of the transaction involved in this case. The jury believed

the government's witnesses and obviously found Scandifia's testimony incredible. Moreover, we cannot perceive any consideration of the evidence which could lead the jury to conclude that Scandifia gave the bonds to Hersch but did not "cause" their movement in interstate transportation, as the term is interpreted by the cases.

The question remains, however, whether there was sufficient evidence to support the jury's finding that Scandifia was the "cause" of the interstate transportation of the counterfeit securities. The basic difficulty encountered when considering causation is that "[t]o consequences no limit can be set." Hart & Honoré, Causation in the Law 64 (1959). Thus, "the consequences of the simplest act may be traced over an ever-widening canvas with the passage of time." *Petition of Kinsman Transit Company,* —— F. 2d —— (2d Cir. 1968). Every enlightened system of jurisprudence, therefore, must have rules or guidelines to determine when a person will no longer be held responsible for a result "caused in fact" by his act or omission.

In the instant case, Scandifia clearly was a cause in fact of the counterfeit bonds entering the stream of interstate commerce; had he not provided Hersch and the investors with the Shell bonds, they would not have transported with the Shell bonds, they would not have transported them between New York and New Jersey. It is also true that Scandifia is not insulated from criminal responsibility merely because the result which the law condemns was achieved through the actions of innocent intermediaries. See, e.g., *United States* v. *Giles,* 300 U. S. 41 (1937); *United States* v. *Weisman,* 83 F. 2d 470 (2d Cir.) cert. denied, 299 U. S. 560 (1936). See also Hart & Honoré, *supra,* Ch. XIII.

The government argues, however, that the evidence was sufficient to support the conviction because it establishes that Scandifia gave the bonds to Hersch "without any limitation as to where he [Hersch] could take them to have the loans negotiated," and that the bonds were thereafter transported in interstate commerce. We would hesitate to endorse the principle that a causal relationship could be found here merely because the interstate transportation was not in any way inconsistent with Scandifia's instructions and redounded to his benefit. In the absence of some evidence that Scandifia intended, knew, or could have reasonably foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines, we question whether the jury would have been justified in concluding that he did more than provide others with the opportunity to do that which the law forbids. And, to provide an opportunity would not seem *ipso facto* to brand one as the causer. Compare Hart & Honoré, *supra*, 48-57. Moreover, the causer as a principal has been eliminated from 18 U. S. C. §2314, and since the 1951 amendment, 18 U. S. C. §2(b) has required that the defendant *wilfully* cause the forbidden act to be done.

In any event, we need not decide the question posed by the government, because we find that the interstate transportation in this case was a reasonably foreseeable consequence of Scandifia's actions. There can be no doubt that a defendant may be found to be a "cause" if the result which the law forbids was reasonably foreseeable. In *United States* v. *Kenofskey*, 243 U. S. 440, 443 (1917), the Supreme Court noted with respect to another statute posing causal difficulties that "cause" is used in its well-known sense of

"bringing about." We stated in *United States* v. *Weisman, supra,* 83 F. 2d at 473, when presented with a comparable problem, that "[i]t has long been settled that a defendant may cause a letter to be sent or delivered by mail though such a mode of transportation was neither known nor intended, provided mailing or delivery by post might reasonably have been foreseen." Compare *Wapnick* v. *United States,* 355 F. 2d 136 (2d Cir. 1966).

With these principles in mind, we affirm Scandifia's conviction. Scandifia knew that Hersch and those to whom Hersch was transferring the bonds often had occasion to be in New Jersey. Indeed, very early in the saga Scandifia met Hersch and Ledwitz at a New Jersey restaurant and again in late October he attended a meeting at Hersch's New Jersey home at which a number of the investors were present. It appears that it was at this meeting that he first broached the subject of using the bonds in order to secure loans. Moreover, as we have already noted, Scandifia personally delivered 100 bonds to Hersch in South Amboy, New Jersey, after the Rabstein loan was negotiated. We have little difficulty, therefore, in concluding that Scandifia could reasonably have foreseen that the Shell bonds would be taken across state lines.

In addition, as to count ten, the evidence disclosed that Scandifia told Hersch "to come into New York and give him the bonds," and, with respect to count eleven, that Scandifia left a meeting in New Jersey with the bonds in his possession and stated specifically that he was going to New York. There is little doubt that the jury could properly infer that he actually went where he declared he in-

tended to go.[6] It follows that Scandifia should reasonably have foreseen the interstate transportation charged in these 2 counts. Indeed, an inference of actual knowledge on his part would not be unreasonable. Under these circumstances, it hardly distorts the practical or fair meaning of the term to conclude that Scandifia was the "cause" of the transportation.

Having made this determination with respect to counts ten and eleven, we need not consider the causation question raised by the other counts, since the trial judge imposed concurrent sentences on all counts. See *Lawn* v. *United States,* 355 U. S. 339 (1958); *United States* v. *Romano,* 382 U. S. 136 (1965); *United States* v. *Gainey,* 380 U. S. 63 (1965); *United States* v. *Gonzales,* 379 F. 2d 285 (2d Cir. 1967) (*per curiam*); *United States* v. *Orza,* 320 F. 2d 574 (2d Cir. 1963).[7]

Only one other point raised by Scandifia merits discussion. During the cross-examination of Irving Cohen, defense counsel brought out that Cohen originally had told agents of the Federal Bureau of Investigation that he had

---

[6] Scandifia insists that because the indictment charged only that he "caused" the transportation he cannot be found guilty for having transported the bonds himself. It seems specious to argue that one who brings about a result directly cannot be fairly said to have caused that result. In any event, Scandifia made no claim of prejudice resulting from the variance and we find no fatal variance.

[7] Scandifia's culpability and participation in the illegal venture is clear and would be unaffected by whether he was technically a "cause" of the interstate transportation as charged in each count. And, there is nothing in the record to suggest that Scandifia received a longer sentence because he was found guilty on 9 counts. See *United States* v. *Bottone,* 365 F. 2d 389, 394 (2d Cir.), cert. denied, 385 U. S. 974 (1966).

obtained the counterfeit bonds from a "Mr. Schweikert." Cohen had testified that he had mentioned "Schweikert" under instructions from Scandifia and, on redirect, he explained that he had obeyed because "[m]y family had received threatening phone calls. . . . [and f]or fear of my family's life, knowing Mr. Scandifia's background." Since the purpose of the cross-examination was to impeach Cohen with a prior inconsistent statement, the trial judge acted well within his discretion in permitting the government to explain away the inconsistency. See 3 Wigmore, Evidence §§1044-46 (3d ed. 1940); McCormick, Evidence §49 (1954). And if there was any prejudice to Scandifia in Cohen's answer, it was cured by the court's prompt instruction to the jury to disregard the reference to Scandifia's background.[8] See *United States* v. *Murphy*, 374 F. 2d 651, 654 (2d Cir.), cert. denied, —— U. S. —— (1967); *United States* v. *Caruso*, 358 F. 2d 184, 186 (2d Cir.), cert. denied, 385 U. S. 862 (1966).

Affirmed.

---

[8] Although Cohen referred to "my family"—and not himself—as having received the threats, the testimony was admissible nevertheless, because a statement offered to show its effect on the hearer is not hearsay. See, McCormick, Evidence, *supra*, §228. Counsel did not seek an instruction limiting the purpose for which the testimony was admitted.

Order Denying Petition for Rehearing In Banc

31705

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JOSEPH SCANDIFIA,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judges having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

.....

Chief Judge
J. EDWARD LUMBARD

March 5, 1968

Order Denying Stay of Mandate

31705

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JOSEPH SCANDIFIA,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

It is further ordered that the motion for a stay of mandate and admission to bail pending the filing of a petition for a writ of certiorari be and it hereby is denied.

HENRY J. FRIENDLY

IRVING R. KAUFMAN

Circuit Judges.

March 5, 1968